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Supreme Court of the United States

October Term, 1961

No. 877

SAM FELDMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Jurisdictional Statement with Reference to Opinions Below	1
Questions Presented for Review	3
Statutes in Point	4
Concise Statement of the Case	7
Reasons Relied on for the Allowance of the Writ of Certiorari:	
POINT I—The petitioner was denied a fair trial by adverse newspaper publicity	14
POINT II—The District Court committed reversible error by its refusal to grant the Petitioner's motion for a new trial based on grounds of improper joinder	18
POINT III—There was a prejudicial variance in proof between the crimes charged in Counts Five and Six of the indictment and the evidence produced at the trial	26
Conclusion	30
Appendix	31

AUTHORITIES CITED

Cases

Delaney v. United States, 199 F. 2d 107	17
Ingram v. United States, 272 F. 2d 567	24
Irving v. Dowd, 366 U. S. 717, 6 L. ed. 2d 751	17

PAGE

Janko v. United States, 366 U. S. 716, 6 L. ed. 2d 846 17

Kotteakos v. United States, 328 U. S. 750, 90 L. ed. 1557 ..... 25, 27

Krulewitch v. United States, 336 U. S. 440, 93 L. ed. 790 17

Marshall v. United States, 360 U. S. 310, 3 L. ed. 2nd 1250 16

McElroy v. United States, 164 U. S. 76, 41 L. ed. 355 23

Schaffer v. United States, 362 U. S. 511, 4 L. ed. 2nd 921 ..... 21, 22, 23

Shepherd v. Florida, 341 U. S. 50, 95 L. ed. 740 17

Stirone v. United States, 361 U. S. 212, 4 L. ed. 2nd 252 27

United States v. Bitz, 179 F. Supp. 80 19

United States v. Bitz, 282 F. 2nd 465 19

United States v. Cohen, 197 F. 2d 26 27

United States v. Schaffer, 266 F. 2d 435 22

Constitution of the United States

Amendment V 4, 29

Statutes

United States Code:

Title 15, Sec. 1 ..... 3, 4, 7

Title 15, Sec. 2 ..... 3, 5, 7

Title 18, Sec. 1951 (Hobbs Act) 2, 3, 4, 5, 7, 26,

Title 28, Sec. 1254 (1) 3

Federal Rules of Criminal Procedure:

Rule 8 (a) (b) 6, 22

Rule 14 ..... 7, 19

IN THE

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Jurisdictional Statement with Reference to Opinions Below

To the Supreme Court of the United States:

SAM FELDMAN, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered on the 28th day of February, 1962. The opinion rendered by the said Court of Appeals is not yet officially reported, — F. 2d —. However, the slip opinion is annexed hereto as the appendix.

The aforementioned judgment by a divided Court (Hon. Harold R. Medina and J. Joseph Smith, Circuit Judges,

voting to affirm, Hon. Paul R. Hays, Circuit Judge, voting to reverse) affirmed a judgment of conviction of the United States District Court for the Southern District of New York, dated and entered the 19th day of May, 1961, which based upon the verdict of a jury adjudged the Petitioner guilty under Count Five (extortion in violation of Title 18 of the United States Code, Section 1951), and Count Six (conspiracy to commit extortion in violation of Title 18 of the United States Code, Section 1951) of the indictment and sentenced him to a term of imprisonment of one year and one day on each of said aforementioned counts, sentences to run concurrently with each other, and said judgment further provided that the petitioner be considered eligible for parole at such time as the Parole Board saw fit (130a, 133a, R. 2413, R. 3071).[1] No opinion was rendered by said District Court.

No petition for a rehearing has been made to the United States Court of Appeals for the Second Circuit.

The Petitioner has made application for an extension of time within which to petition for certiorari and by order of Mr. Justice Harlan dated the 15th day of March, 1962, the Petitioner's time to petition for a writ of certiorari has been extended up to and including the 16th day of April, 1962.

Jurisdiction is conferred on the Supreme Court of the United States to review the aforementioned judgment of

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[1] Numerals in parentheses followed by letter "a" refer to pages of the Appendix to petitioner's Brief in the United States Court of Appeals for the Second Circuit. Numerals in parentheses preceded by "R" refer to numerals of the Record on Appeal filed with the United States Court of Appeals for the Second Circuit.

the United States Court of Appeals for the Second Circuit by writ of certiorari under Title 28, U.S.C. Section 1254(1).

Questions Presented for Review

1. Did the District Court commit reversible error in denying petitioner's motion for a mistrial based on adverse newspaper publicity when the newspaper article in question referred to the petitioner as the former President of the Newspaper and Mail Deliverers' Union and as one of the former officials of said union on trial for extortion and violation of the Anti Trust Laws, and which article further stated that two of petitioner's co-defendants had pleaded guilty and identified one of said co-defendants, Harry Waltzer, as a former official of the said union and stated that the other co-defendant, Irving Bitz, had already received a five year prison term on his plea?

2. On the trial of an indictment containing counts charging anti-trust violations (15, U.S.C., Sections 1 and 2) and Hobbs Act violations (Title 18, U.S.C., Section 1951) did the District Court commit reversible error in denying the petitioner's motion for a new trial made at the conclusion of the trial but prior to the imposition of sentence and entry of judgment on the jury's verdict, where said motion for a new trial renewed prior motions for a severance made by the petitioner prior to and during the trial, and where the sole bases of joinder and for denying severance were the anti-trust counts (Counts 1 and 2), which counts had been dismissed during the trial because the Court found that the evidence upon which the Government based said counts did not constitute violations of the anti-trust laws?

3. Was there a prejudicial variance between the charges as contained in the indictment and the proof presented at the trial where Counts 5 and 6 of the indictment charged Hobbs Act violations (Title 18, U. S. Code, Section 1951), alleging a conspiracy to extort and extortion of property of the value of $45,000 from Suburban Wholesalers Association, while the evidence at the trial purported to show an extortion of the sum of $65,000 from Suburban Wholesalers Association and another newspaper distributors association? Furthermore, could the Government, by means of a bill of particulars, amend the charges contained in said indictment to conform to the evidence to be presented without violating petitioner's right to be tried only on charges presented in an indictment returned by a grand jury, as guaranteed by Amendment V of the Constitution of the United States?

Statutes in Point

United States Code
Title 15—Commerce and Trade

CHAPTER 1—MONOPOLIES AND COMBINATION IN RESTRAINT OF TRADE

§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States; or with foreign nations shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

Title 18

CHAPTER 95— RACKETEERING

1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property, in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * * * *

Title 18, Federal Rules of Criminal Procedure

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Concise Statement of the Case

THE TRIAL

The jurisdiction of the United States District Court for the Southern District of New York was originally invoked because the crimes charged, violations of Title 15, U.S.C. §§ 1 and 2 and Title 18, U.S.C. § 1951 arose under the Laws of the United States and are alleged to have been carried out in part within the Southern District of New York.

The trial of the Petitioner and of the other defendants tried together with him lasted fourteen trial days. The bulk of the Government's case was addressed to the Anti Trust Counts, Counts One and Two while other testimony was addressed to Counts Three and Four, the 1955 Hobbs Act Counts which did not involve the Petitioner. The sole witnesses who testified against the Petitioner and who testified directly concerning the charges alleged in Counts Five and Six of the indictment, the Counts upon which the Petitioner was convicted, were the witnesses James B. Gaynor, President of Gaynor News Co. and Vice President of Suburban Wholesalers Association (R. 914 et seq.), John Fylstra, President of Passaic News Co. and Treasurer of Suburban Wholesalers Association (R. 1151 et seq.), Isaac

Cohen, President of Hudson County News Co. and a member of Suburban Wholesalers Association (R. 1391 et seq.) and Abraham Rosen, Treasurer of Metropolitan News Co. and a member of The Morning Newspapers Wholesalers Association (R. 1291 et seq.).

Other members of Suburban Wholesalers Association (hereinafter referred to as Suburban Wholesalers) testified to the delivery by them of certain sums of money to the officers of Suburban Wholesalers during the months of January and February, 1957.—Benjamin Gelfand, President of New Jersey Holding Corp. (R. 1439, 1460); Selig J. Rachles, Vice President of Hackensack News Co. (R. 1516, 1519); Harry Goldstein, Chairman of the Board of United Newspaper Delivery, Inc. (R. 1530, 1543), Daniel Rachles, President of S. Rachles, Inc. (R. 1322, 1335), and Beatrice Hechtman, Manager of Rockland News Co. (R. 1555, 1556).

The testimony including cross-examination of these particular witnesses, some of whom also testified concerning the unrelated 1955 transaction, took approximately two and one-half days (April 12, 13 and 14).

The testimony against the Petitioner is best outlined by a summary of the testimony of the witness James B. Gaynor, concerning the alleged 1957 transaction. Gaynor who is President of Gaynor News Co. and whose companies distribute newspapers and magazines in Westchester County, New York and Fairfield County, Connecticut (R. 915-918) testified as follows:—that he was on the dates in question, Vice President of Suburban Wholesalers; that Arthur Somyak was President and John Fylstra was Treasurer (R. 929); that the principal function of Suburban

Wholesalers was to protect the mutual interests of its members, which mainly consists of negotiating a contract periodically with the Newspapers & Mail Deliverers Union (R. 930, 931); that during the year 1957, the Petitioner was President of the Newspaper and Mail Deliverers Union (R. 957); that the contracts of the members of Suburban Wholesalers with the Union were expiring on the last day of January 1957 and that as late as the last week of January, 1957, no agreement was as yet concluded with the Union concerning a new contract (R. 959, 960).

Gaynor further testified that during the last week of January, 1957, he attended a meeting at the Belmont-Plaza Hotel in New York City (R. 960, 961); that present at said meeting were Arthur Somyak, President of Suburban Wholesalers and owner of Rockaway News Co.; John Fylstra, Treasurer of Suburban Wholesalers and an officer of Passaic News Co.; Isaac Cohen, a member of Suburban Wholesalers and an officer of Hudson News Co.; Abraham Rosen of Metropolitan News Co., not a member of Surburban Wholesalers; the defendant Irving Bitz of Bronx County News Co., also not a member of Suburban Wholesalers (R. 965), and the Petitioner; that the Petitioner made mention of a strike vote having been taken or being scheduled to be taken and that the Petitioner then made the following statement:

> "I brought Irving Bitz here" or "Irving Bitz came with me" • • • "and he will handle the details for the official family" • • • "and the only way you are going to get a contract is if you give Irving Bitz whatever he works out with you people. He knows what he's got to have" (R. 963).

Gaynor further testified that the Petitioner left the meeting; that Bitz in Petitioner's absence asked for $65,000. stating that if that sum was not paid there would be no contract with the Union (R. 964); that the matter was discussed with Abraham Rosen, who represented the Morning Wholesalers, a New York City group, and it was finally agreed that Suburban Wholesalers would pay $45,000 of the aforementioned sum and that the Morning Wholesalers would pay the balance (R. 966); that a few days afterwards Bitz called him and stated that he had to have a downpayment of $7,500. and that this sum was paid to Bitz in Bitz's apartment (R. 968). Gaynor further testified that after the conclusion of a short strike, on or about the first week of February, 1957, a new contract was agreed to between Suburban Wholesalers and the Union (R. 971); that shortly thereafter at a meeting at the New York Athletic Club the members of Surburban Wholesalers delivered to the officers of Surburban Wholesalers their respective shares of the balance of the sum that Bitz had previously asked for (R. 972); that Bitz walked in and was given the money; and that Abraham Rosen, who was also present, went into another room with Bitz (R. 975). (See also testimony of John Fylstra R. 1186-1202 and Abraham Rosen R. 1291-1299).

The testimony of the witness Isaac Cohen was so contradictory that it must be discredited in its entirety (R. 1391-1439).

THE PETITIONER'S DEFENSE

The Petitioner for his defense, in addition to appearing as a witness in his own behalf (R. 1936, *et seq.*), called eleven character witnesses to testify as to his good

reputation in the community (R. 1901-1914, R. 1932-1935, R. 1962-1964, R. 2038-2041).

As part of his defense Petitioner produced documentary records from the Belmont Plaza Hotel as to the meeting held there on January 16, 1957 [See Government's Exhibits 74, 75 (Feldman's Exhibit F) for Ident., Exhibit 76 (Feldman's Exhibit G) for Ident., Exhibit 77 (Feldman's Exhibit H) for Ident., (R. 1916), (Feldman's Exhibits D and E for Ident.] (R. 1917). All of the records of Belmont Plaza Banquet, Inc. concerning the night of January 16, 1957 were admitted in evidence as Feldman's Exhibits D, E, F, G, H, I, J and K (R. 1921-1924). See also testimony of Nathan A. Kaplan, General Manager of Belmont Plaza Banquet, Inc. (R. 1914, *et seq.*). These records indicate that the only meeting held at the Belmont Plaza Hotel on January 16, 1957 was reserved by the witness Gaynor.

The Petitioner on taking the witness stand (R. 1938, et seq.) testified as to his family life (R. 1926), his outstanding war record, his services to the cause of his fellow workers, which culminated in his being elected to the presidency of the union (R. 1946), and denied his guilt as to all of the charges alleged against him in the indictment (R. 2025, 2027).

The Petitioner's testimony concerning the January 1957 meeting was as follows:—That on the morning of January 16, 1957, he received a call from James B. Gaynor; that Gaynor told him that Gaynor's group was meeting that night at the Belmont Plaza Hotel and that Gaynor wanted the Petitioner to drop in at their meeting that night at about 7:00 or 7:30 p.m. (R. 1987); and that evening he went to the

Belmont Plaza Hotel, to Gaynor's room where there were 10 or 12 people present including the people that the witnesses, Gaynor, Fylstra and Rosen previously testified about, and that Irving Bitz was already in the room when he arrived (R. 1988).

The Petitioner further testified that at the January 16th meeting he asked Irving Bitz (R. 1988) and Abraham Rosen (R. 1991) the only parties present who were not members of Suburban Wholesalers, what they were doing there; that Gaynor stated that Bitz and Rosen were present because the meeting was covering the entire situation including the publishers' contracts, the wholesalers' contracts and the pending union proposals (R. 1991, 1993); that Abraham Rosen and Irving Bitz then spoke up stating that the reason that they were present at the meeting was because certain union proposals, if accepted by Suburban Wholesalers, would have an industry-wide effect and would cause their workers to seek similar concessions (R. 1991, 1995).

The Petitioner then testified concerning the possibility of a strike as follows:

> Q. And then when you spoke to the people they spoke to you? A. Actually the way it was, I went over to Jimmie Gaynor, he was sitting on the right, and I said, 'Now what's the procedure. What do you want me to do? Where do you want me to sit at? Who's chairman? Who's going to ask the questions?' because I had my sheet or proposals with me for the Suburban Wholesalers.
>
> 'Well,' he said to me, 'look, Sam, so we can all see you, sit at the front of the table, like in the center, where they can all see you,' and they sat on the side.

And Abe Rosen I know sat right across from me—

Q. Who? A. Mr. Rosen sat across from me like you. You don't forget things like that.

Q. What happened after that? Tell us what happened. A. Well, what happened there was—

Q. What did you say (R. 1992)? A. I said—they said to me, 'Well, what's this—we hear there is a lot of problems, our shop steward.'

I said, 'Well, look, I will give it to you frankly.' I never mixed any bones with anybody. I make a statement, as you might know, Mr. Stim.

I said to him, 'if you want a strike you'll have it unless you will avoid it. You can avoid a tremendous economic strike because,' I said, 'I hate strikes, it is an economic loss to the union members, you go through a lot of aggravation, a lot of abuse, and not only that, you never gain anything. I know you could avoid a strike, if you listen if you go along with some of these demands.'

'Well,' he said, 'what do you mean? What demands? The demands that you have sent us, can you explain everything to us? We can't agree to everything the union sends us.'

So I said to him, 'I understand, but you have to satisfy different groups of the union. In other words, you have got a group of Jersey members, you have got a group of Westchester people. Every shop deserves some benefits for their ownself, because there are certain conditions in certain shops and there are (R. 1993) different conditions in other shops.' And I said to him, 'If you could do that I personally think from my observation as the president and as the observer with these committeemen, I think we could avoid a strike and I would love to do that, avoid it. Everybody hates strikes. " " " (R. 1994).

The Petitioner further testified that the testimony of the Government witnesses Gaynor, Fylstra and Rosen concern-

ing the 1957 meeting at the Belmont Plaza was a lie (R. 2000); that he never asked Irving Bitz to collect money from the wholesalers in order to avoid a strike nor did he ever get any such money to avoid a strike (R. 2002); that on January 31, 1957, a strike was voted and the proposed Union contract with the wholesalers was rejected (R. 2006); that subsequently when Union and Management met at the Federal Mediation Service offices none of the Government witnesses nor anyone else told him about any conversations that they allegedly had with Bitz or about payments of money to him to avoid the strike (R. 2008) and that subsequently a new contract with increased benefits was negotiated and accepted by the Union (R. 2008).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

POINT I

The petitioner was denied a fair trial by adverse newspaper publicity.

On the second day of the trial, the Petitioner moved for a mistrial on the ground that ten of the jurors admitted reading a newspaper article concerning the trial of the action which singled out the name of the Petitioner identifying him as the former president of the Newspaper & Mail Deliverers Union and as one of the individuals remaining on trial on charges of extortion and of violation of the anti-trust laws and specified by name only two other parties defendants in the action, to wit: Irving Bitz and Harry Waltzer, stating that they had pleaded guilty and that Bitz had already received a five year sentence on his plea

(69a, R. 155-156). The newspaper article is quoted verbatim in the record (61a-62a, R. 138-141). This motion was denied and exception was taken (65a, R. 146).

It is noteworthy to observe that the defendant Harry Waltzer pleaded guilty only to Counts 1, 3 and 4 of the Indictments and as to Counts 2, 5 and 6 his trial was severed (6a, R. 4) and his plea of not guilty remained in effect during the trial.

While the aforementioned newspaper article was the immediate basis for the motion made at the trial, the Petitioner was continuously harassed by adverse newspaper publicity from the time of the return of the indictment up until the trial thus making a fair trial impossible. In the Petitioner's omnibus motion made on August 10, 1959, the Petitioner moved for a change of venue based upon prejudice resulting from adverse newspaper publicity (R. 2522). Annexed to the moving papers were articles of all of the local newspapers relating both to the present indictment and the companion indictment returned in the Court of General Sessions, New York County and which indictment covers the same facts upon which the present indictment is based (R. 2529-2542). A hearing was held on this motion before the Hon. Edward J. Dimock on December 16, 1959 (R. 2851-2940) and this branch of the motion was denied by order of Judge Dimock dated January 20, 1960 (37a, R. 2992).

It was against such a background that preceded the trial of this action that caused counsel for the Petitioner at the trial to concede in his defense the guilt of the co-defendants Bitz and Waltzer and to make offers of proof with regard to them and their character to show that they might make

false statements to others concerning the Petitioner. These proofs the trial Court refused to permit (64a, 65a, R. 144-146).

While it is true that the judge on the trial of this action upon learning that ten of the jurors had read the newspaper article, questioned the jurors as to whether the newspaper article would influence their judgment and whether they would follow the Court's instructions implicitly as to the elements of proof required to convict and received a negative response to the first inquiry and a positive response to the latter (68a, R. 155) it is respectfully submitted that the damage had already been done which could not be undone by the precautionary instructions of the Court. This fact was recognized by Judge Hays in his dissent (See Appendix, Page 39 of this petition).

Marshall v. *United States*, 360 U. S. 310, 3 L. ed. 2nd, 1250, cited in both the majority and dissenting opinions of the Court of Appeals, involved two adverse newspaper articles during the trial. In *Marshall* v. *United States, supra*, the Supreme Court ordered a reversal of a conviction for violation of the Federal Foods & Drugs Act because three jurors admitted they had read the first of the articles, one admitted that he had read both articles and three others had scanned the first article and one of them had also seen the second article. The Trial Judge in *Marshall* after ascertaining from the jurors that they would not be influenced by the news articles, denied the Petitioner's motion for a mistrial. The Supreme Court in reversing the conviction stated that the newspaper exposure of the jurors to matters not admissible in evidence, required the reversal of the conviction and ordered a new trial.

For recent decisions of the Supreme Court condemning miscarriages of justice caused by anticipatory trial by newspaper publicity see *Irvin* v. *Dowd*, 366 U. S. 717, 6 L. ed. 2d 751 and *Janko* v. *United States*, 366 U. S. 716, 6 L. ed. 2d 846.

See also *Shepherd* v. *Florida*, 341 U. S. 50, 95 L. ed. 740 and *Krulewitch* v. *United States*, 336 U. S. 440, 453, 93 L. ed. 790.

In *Delaney* v. *United States* 199 F. 2nd 107, where a conviction was reversed on the grounds of the prejudicial effect of newspaper publicity at the trial, the problem involving the conflicting rights of freedom of the press and the right of a defendant to a fair trial by an impartial jury was exhaustively covered by the United States Court of Appeals for the First Circuit. The Court stated on page 112, as follows:

> * * * No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring in Krulewitch v. United States, 1949, 336 U. S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction.' And see Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840, 842-43 (1950). One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently

> exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

It is respectfully submitted that upon the facts of the present case, the Trial Court committed reversible error when it denied the Petitioner's motion for a mistrial because of adverse prejudicial newspaper publicity.

POINT II

The Court committed reversible error by its refusal to grant the Petitioner's motion for a new trial based on grounds of improper joinder.

There are two unique factors that distinguish this case from the other reported cases. They are: First—that the Government admittedly based the charges of anti-trust violations alleged in Counts One and Two of the indictment upon the Hobbs Act violations alleged in the remaining counts of the indictment (76a, R. 1893, 2092); and Second—that the two anti-trust counts alleged in the indictment and which formed the basis of the joint trial of the Petitioner and other co-defendants, were dismissed by the Trial Court for failure of proof prior to the submission of the case to the jury. Count Two was dismissed as to all of the defendants as the close of the Government's case (R. 1780, 1811-1838, 1852, 1864, 1898). At the close of the entire case, the Court granted Petitioner's motion for dismissal of Count One stating at time that he was granting the motion because of lack of evidence and failure of proof with respect to impact on interstate commerce (80a, R. 2098).

It is quite clear that at the time that the anti-trust counts were formulated that the Government had full knowledge of the basic evidence upon which it intended to rely on the trial in order to prove said counts and that the basis of these counts was the Government's theory of creating an anti-trust case from the two Hobbs Act violations which theory however was not supported by the evidence or facts known to the Government both at the time of the presentation of the case to the grand jury and again at the trial.

While the sufficiency of the allegations in the indictment as to Count Two were upheld by the District Court (R. 2776-2792) (See *United States* v. *Bitz*, 179 F. Supp. 80) and the sufficiency of the allegations contained in Count One of the indictment were upheld by the Court of Appeals after said Count had been dismissed by the District Court (See *United States* v. *Bitz*, 282 F. 2nd 465) it is quite obvious that the conclusory allegations of law and fact set forth in Counts One and Two of the indictment had no basis in law or fact as shown by the evidence presented at the trial of this action which is presumably the same evidence as presented to the Grand Jury as the Government did not claim surprise at the trial.

Various motions for severance were made by the Petitioner throughout different stages of the proceeding. The first of these motions was made by notice of motion dated August 10, 1959 and which motion was made pursuant to Rule 14 of the Federal Rules of Criminal Procedure and was based upon the allegation of prejudicial joinder of offenses and defendants (25a, R. 2522). On this motion, the Petitioner brought out the fact that he was not named as party defendant in Counts Three and Four of the indict-

ment which alleged separate independent crimes from those charged against him in Counts Five and Six (these counts charged a 1955 Hobbs Act Violation [20a-21a, R. 2430-2431] against the defendants Angelo Lospinuso, William Walsh and Harry Waltzer) and furthermore that certain of the defendants named in the indictment were not parties defendants to Counts Five and Six which charged the Petitioner as a party defendant (26a, R. 2528). This motion was argued together with motions for severance by other defendants before the Hon. Edward J. Dimock, United States District Judge on December 16th and 17th, 1959 (27a-34a, R. 2851-2940) and was denied by decision and order dated January 20, 1960. The main basis of the denial was that as all of the defendants were named together in one common count, to wit, Count Two of the indictment that the motions should be denied (36a, 37a, R. 2988, 2989).

Thereafter and on the first trial of this action, on April 3, 1961, which trial terminated the same day in a mistrial, the Petitioner moved for a severance on the grounds that he was not allowed by the Trial Court to make reference to the defendant, Irving Bitz on his opening or to introduce evidence of the bad character of said defendant. This motion was denied (44a, R. 3104).

At the commencement of the trial on April 4, 1961, the Petitioner again moved for a severance on the ground of the Court's refusal to allow him to refer to the defendant, Irving Bitz in his opening statement, to offer evidence of the bad character of the defendant, Irving Bitz (55a, R. 16) and on the further ground that the Trial Court would not allow him to make reference or offer of proof with regard

to the defendant Harry Waltzer (59a, R. 22). These motions were denied. Both Irving Ritz and Harry Waltzer were not on trial, both having already pleaded guilty to various counts of the indictment.

At the conclusion of the entire case and after the Petitioner had been found guilty by the jury but immediately prior to sentence, the Petitioner moved for a new trial renewing his prior motions for a severance (127a, R. 2369). At this time it was brought to the attention of the Court that upon the Court's dismissing Counts One and Two of the indictment prior to the submission of the case to the jury, there was no longer any reason remaining for joinder of the defendants on the trial and that in the interest of justice a severance should be granted and a mistrial declared (128a, R. 2370). This motion was denied (129a, R. 2377).

A case directly in point is *Schaffer* v. *United States*, 362 U. S. 511, 4 L. ed. 2nd 921, which involved a joinder of various defendants in a four count indictment. The first three counts charged separate substantive crimes involving transportation of stolen goods over state lines. Various of the Petitioners were named separately as defendants in separate substantive counts; however, all of the said Petitioners and defendants were named in the fourth and final count of the indictment which charged a conspiracy to commit the substantive offenses. On the trial, at the close of the Government's case, the Court dismissed the conspiracy count for failure of proof, however, the substantive counts were submitted to the jury which found the said Petitioners guilty on said counts. Both the Court of Appeals (See *United States* v. *Schaffer*, 266 F. 2nd 435) and

the Supreme Court affirmed the conviction, both courts agreed however that were it not for the conspiracy count, it would clearly have been erroneous to try the appellants together under Rule 8(b) of the Federal Rules of Criminal Procedure. The Supreme Court in its opinion at page 516 stated the rule with regard to the duty of the trial judge in such cases:

> "* * * Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice. *However, the Petitioners here not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial.* Instead they relied entirely on their motions for acquittal. * * *" (Italics ours.)

The Court of Appeals (Second Circuit) in its opinion in *Schaffer* cited as *United States* v. *Schaffer*, 266 F. 2nd 435, at page 440, stated as follows:

> "*Were Appellants Prejudiced by the Joint Trial* [3, 5] Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P., 18 U. S. C. For, there would be no common participation 'in the same act or transaction constituting an offense' which is a requisite to joinder. See Kotteakos v. United States, 1946, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; McElroy v. United States, 1896, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355; Brooks v.

United States, 5 Cir. 1947, 161 F. 2d 142. However, the allegation of a conspiracy count meets the requirements of Rule 8(b) and hence at the outset the joinder was proper and within the discretion of the trial court. United States v. Ball, 1896, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300; United States v. Lebron, 2 Cir. 1955, 222 F. 2d 531, certiorari denied, 350 U. S. 876, 76 S. Ct. 121, 100 L. Ed. 774; United States v. Cohen, 2 Cir. 1941, 124 F. 2d 164, 165, certiorari denied sub nom. United States v. Bernstein, 315 U. S. 811, 62 S. Ct. 796, 86 L. Ed. 1210. Moreover, it is not claimed, nor could it be with any show of reason, that the conspiracy count was alleged by the prosecution in bad faith. * * *"

See also:

McElroy v. *United States*, 164 U. S. 76, 41 L. ed. 355.

It will be noted that whereas there was no challenge by Petitioners in *Schaffer* as to the propriety of the common count linking all of the said defendants, to wit: the conspiracy count, there is such a challenge in the present case as the common count against all of the defendants and the sole count upon which the Court below relied on to deny a severance was Count Two of the indictment, one of the anti-trust counts which was based solely upon the Government's erroneous theory that the evidence concerning the separate 1955 and 1957 Hobbs Act violations, also constituted per se violations of the Anti-Trust Laws.

It is respectfully submitted, that insofar as the Government erred in its construction of the legal effect of said evidence, that the anti-trust counts of the indictment should be considered void ab initio with respect to consideration of the rights of the Petitioner for a severance. The Court

of Appeals in its opinion which is hereto annexed (See Appendix, Pages 37 and 38 of this petition) by-passed consideration of this point apparently feeling that only malicious conduct on the part of the Government Attorney was necessary to warrant action. It is submitted however, that error by the government in the absence of malice is sufficient to raise this point especially when said error resulted, as it did in the instant case, in the return of a common count or counts upon which joinder of defendants is predicated.

In *Ingram* v. *United States*, 272 F. 2nd 567 (U. S. C. A. 4th, 1959) a judgment of conviction was reversed and a new trial was ordered on the ground of improper joinder, the Court stating at page 569, as follows:

> "* * * [1] Rule 8(b) specifically states when it is permissible to join defendants in a single indictment and trial. It provides that two or more defendants *may* be jointly charged if they are alleged to have participated in the same act or transaction. The necessary inference from this is that they *may not* be jointly indicted or tried in the absence of a common act or transaction. Rule 14 confers upon the trial judge discretion to relieve from prejudicial joinder. Several defendants may have been involved in the same act or transaction, but for some reason, one or more of them may be prejudiced by the normally permissible joinder. It is to avoid injustice in such a situation that Rule 14 vests the trial judge with wide discretion. But the joinder of defendants and offenses totally unconnected is prohibited by Rule 8(b). This is not a matter of discretion; both the statutory language and the decided cases make this clear. * * *"

The Court further stated at page 570, as follows:

"* * * In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief. * * *"

Certainly the dangers to a defendant of transference of guilt from one defendant to another across the lines supporting separate conspiracies or crimes as mentioned in *Kotteakos* v. *United States*, 328 U. S. 750, 774, 90 L. ed. 1557, 1571, is amply demonstrated in the present case.

It is noteworthy to observe that after the jury retired to deliberate on the verdict, the only additional information that they requested applied solely to testimony, exhibits and the Court's charge with regard to the Petitioner alone (115a-125a, R. 2348-2362). From the facts of the trial, it is certainly reasonable to assume that the evidence as to the other defendants on the counts alleging crimes other than the crimes for which the Petitioner was tried, carried over to affect the deliberation of the jurors with regard to the guilt or innocence of the Petitioner even though the Trial Court admonished the jury to disregard such testimony in so far as the Petitioner was concerned.

POINT III

There was a prejudicial variance in proof between the crimes charged in Counts Five and Six of the indictment and the evidence produced at the trial.

Count Five of the Indictment charges the Petitioner and others with the substantive crime of the extortion of $45,000.00 from the Suburban Wholesalers during the year 1957 in violation of Title 18, United States Code, Section 1951 (22a, 23a, R. 2432), while Count Six charges the said Petitioner and others with the crime of conspiracy to commit the crime alleged in Count Five (23a, 24a, R. 2433).

Whereas the indictment referred to an alleged extortion and conspiracy to extort $45,000.00 from Suburban Wholesalers, the evidence presented at the trial referred to an entirely different extortion involving different individuals and for a different sum of money. More particularly the evidence presented at the trial referred to a demand by and a payment to the defendant, Irving Bitz of the sum of $65,000.00, not only by members of Suburban Wholesalers but also by certain other newspaper wholesalers doing business in the City of New York and known as Morning Wholesalers (See testimony of witness Gaynor, R. 964, 965, 972 and 975; testimony of the witness Fylstra, R. 1190, 1200-1202, and testimony of the witness Rosen, R. 1297, 1312).

It further appears from the testimony of the aforementioned government witnesses that any decision to split the sum of $65,000.00 into portions to be paid by the various groups (i.e., $45,000.00 to be paid by members of Suburban Wholesalers and $20,000.00 to be paid by members of Morning Wholesalers) was made by the alleged payees themselves (See testimony of the witness Gaynor, R. 966, the

witness Fylstra, R. 1191 and the witness Rosen, R. 1307, 1308).

It is hornbook law that the Government may, not, to suit its own convenience, split one large over-all conspiracy into several smaller constituent conspiracies (See *United States v. Cohen*, 197 F. 2nd 26, 29).

Certainly the fact that the Petitioner was required at the trial to defend himself against charges other than those specified in the indictment in and of itself constitutes prejudice.

In *Kotteakos v. United States*, 328 U. S. 750, 90 L. ed. 1557, the Supreme Court enunciated the rule that for the Government to string together under the guise of one conspiracy for common trial, separate and independent conspiracies whose sole common connection is merely that one man participated in all of them was a prejudicial variance in proof, so as to affect the substantial rights of the accused and to necessitate a reversal of the judgment of conviction on said conspiracy.

Stirone v. United States, 361 U. S. 212, 4 L. ed. 2nd 252, dealt specifically with a Hobbs Act case. In *Stirone* the indictment charged a Hobbs Act violation concerning the alleged extortion of $31,274.13 with regard to the furnishing of ready-mix concrete to be used in the erection of a steel processing plant at Allenport, Pennsylvania. At the trial and over the defendant's objection, the Trial Court permitted the Government to offer evidence as to the effect on interstate commerce not only in sand brought into Pennsylvania, but also an effect on interstate commerce in steel shipments from the steel processing plant in Pennsylvania into Michigan and Kentucky. The Trial Court in its charge

to the jury further charged that Stirone's guilt could be rested either on a finding that sand used to make the concrete had been shipped from another State into Pennsylvania or that the concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce from Pennsylvania into other States. The Supreme Court in reversing the judgment of conviction and the judgment of affirmance by the United States Court of Appeals for the Third Circuit stated at page 215 as follows:

> • • • • We agree with the Court of Appeals that Rider's dependence on shipments of sand from outside Pennsylvania to carry on his ready-mixed concrete business entitled him to the Hobbs Act's protection against interruption or stoppage of his commerce in sand by extortion of the kind that the jury found the petitioner had committed here. That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' 18 USC § 1951 (a). Had Rider's business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by Rider's compliance with Stirone's coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed. United States v. Green, 350 US 415, 420, 100 L ed 494, 500, 76 S Ct 522.
>
> Whether prospective steel shipments from the new steel mills would be enough, alone, to bring this transaction under the Act is a more difficult ques-

> tion. We need not decide this, however, since we agree with the dissenting judges in the Court of Appeals that it was error to submit that question to the jury and that the error cannot be dismissed as merely an insignificant variance between allegation and proof and thus harmless error as in Berger v. United States, 295 US 78, 79 L. ed. 1314, 55 S. Ct. 629. The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment. • • • "

The Court went on to state at page 217:

> .. • • • While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. • • • "

In the present case the Court of Appeals in its opinion while recognizing that there was a variance, held that it did not affect a substantial right of the Petitioner (Appendix, Pages 35 and 36 of this petition). Certainly the denial of a constitutional right, the right that an indictment charging a felony be returned by a Grand Jury as guaranteed by the U. S. Constitution, Amendment V, is a substantial right which cannot be denied under the guise of a bill of particulars as was done in the present case where the indictment was in fact amended to charge another crime.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction of the Petitioner reversed.

Respectfully submitted,

ALLEN S. STIM
Member of the Bar of the Supreme Court
of the United States
Attorney for Petitioner

Of Counsel:

MENAHEM STIM
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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 200—September Term, 1961.

(Argued January 17, 1961 Decided February 28, 1962.)

Docket No. 27050

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAM FELDMAN,

Appellant.

Before:

MEDINA, SMITH and HAYS,

Circuit Judges.

Appeal by defendant Sam Feldman, from a judgment of conviction in the District Court for the Southern District of New York, Edward Weinfeld, *J.*, upon a jury verdict finding appellant guilty of obstructing interstate commerce and conspiring to obstruct interstate commerce by means of extortion in violation of Section 1951 of Title 18 United States Code (Hobbs Act). The appellant was sentenced to a term of imprisonment of one year and one day on the substantive count and one year and one day on the

conspiracy count, said sentences to run concurrently. Affirmed on both counts.

PATRICK M. RYAN, Attorney, Dept. of Justice, Washington, D. C. and Herman Gelfand, Attorney, Dept. of Justice, New York, N. Y. (Lee Loevinger, Asst. Attorney General and Richard A. Solomon and Harry Sklarsky, Attorneys, Dept. of Justice, Washington, D. C., on the brief), *for appellee.*

MENAHEM STIM, New York, N. Y. (Allen S. Stim, New York, N. Y., on the brief), *for appellant.*

SMITH, *Circuit Judge*:

This is an appeal from a judgment of conviction in the Southern District of New York upon a jury verdict of guilty of obstructing commerce by extortion in violation of the Hobbs Act, 18 U. S. C. 1951, and conspiring to do so, Edward Weinfeld, *Judge*. Judgment affirmed on both counts.

On June 23, 1959 a six count indictment was returned against eleven individual and one corporate defendant. The defendants included appellant, President of the Newspaper and Mail Deliverers Union; Stanley Lehman, Secretary-Treasurer of the Union; Harry Waltzer, William Walsh, John Lawrence, Jr., and Angelo Lospinuso, business agents of the Union; Irving Bitz, an officer and stockholder in Bi-County News and Bronx County News; William Fello, an officer and stockholder of Bi-County News Corp.; Rocco Fello, an employee of Bi-County News Corp.;

Charles Gordon, an officer and stockholder of Bronx County News Corp.; Michael Spozate, an officer of Pacific News Corp.; and Pacific News Corp.

The appellant was tried together with defendants William Walsh, John Lawrence, Jr., Angelo Lospinuso, Stanley J. Lehman, William Fello, Rocco Fello and Bi-County News Corp., the trials of other defendants having been severed.

Count One charges all of the defendants with having engaged in an unlawful combination and conspiracy in restraint of interstate trade in violation of Section 1 of the Sherman Act, 15 U. S. C. 1. Count Two charges all the defendants with having engaged in an unlawful combination to monopolize trade in violation of Section 2 of the Sherman Act, 15 U. S. C. 2. Count Three charges defendants Lospinuso, Walsh and Waltzer with extortion in violation of the Hobbs Act, 18 U. S. C. 1951, during January and February of 1955. Count Four charges the same defendants with a conspiracy to commit the extortion charged in Count Three. Count Five charges that Sam Feldman (appellant), Irving Bitz, Stanley J. Lehman, John Lawrence, Jr., Harry Waltzer and Michael Spozate did knowingly and wilfully obstruct, delay and affect the movement of newspapers and magazines in interstate commerce by extorting the sum of $45,000 in February 1957 from the officers and agents of Suburban Wholesalers Association in violation of the Hobbs Act. Count Six charges the defendants named in Count Five with a conspiracy to commit the extortion alleged therein.

Count Two was dismissed as to all defendants at the close of the government's case, and at the close of the entire case the court granted a motion to dismiss Count One

as to the remaining defendants. Verdicts of acquittal were directed for defendants William Fello, Rocco Fello, Stanley J. Lehman, John Lawrence, Jr., and Bi-County News as to all counts pending against them.

Appellant Feldman was president of the Newspaper and Mail Deliverers Union, which was the sole bargaining agent for the employees of the members of Suburban Wholesalers, engaged in the handling and delivery of newspapers and magazines. The contract between Suburban and the Union was due to expire January 31, 1957. Consequently, sometime during the latter part of January a meeting was held in the Belmont Plaza Hotel which was attended by: Feldman as president of the union; certain members of Suburban Wholesalers; Abraham Rosen and Isaac Cohen as members of Morning Wholesalers, an informal association of newspaper distributors which like Suburban handled contract negotiations with the union for its members; and Irving Bitz, an officer of Bi-County News Co. The government presented testimony of four witnesses—James Gaynor, President of Gaynor News Co., and Vice President of Suburban; John Eylstra, President of Passaic News Co., and Treasurer of Suburban Wholesalers; Abraham Rosen, Treasurer of Metropolitan News Co. and a member of Morning Wholesalers; and Isaac Cohen, President of Hudson County News Co. and a member of Morning Wholesalers—who had attended this meeting.

These witnesses testified that Feldman brought Bitz to the meeting and threatened them with a strike should they fail to "give Irving Bitz whatever he works out with you people." Record on Appeal 963. These same witnesses related that thereupon Feldman left the meeting and Bitz

demanded $65,000 for himself and four Union officials including appellant in return for a new contract. Suburban agreed to pay $45,000 and Morning agreed to pay the $20,000 balance. Shortly thereafter Bitz demanded and was paid $7,500 on account. On January 31, 1957 the union membership rejected the contract which had been recommended by the appellant and the executive board and voted to strike. The strike was short lived and settled in about one week and in the middle of February another meeting was held and the balance which had been previously agreed upon was paid to Bitz.

Appellant asserts the following errors on appeal: (1) that there was a prejudicial variance between the indictment and the proof; (2) the appellant was denied a fair trial by reason of certain adverse newspaper articles which had been read by the jurors; (3) the trial court committed reversible error in denying appellant's motion for a severance; (4) the government failed to prove a prima facie case against appellant Feldman.

I.

Plaintiff's claim of prejudicial variation between the indictment and the proof is based upon the fact that the indictment charged extortion of $45,000 from Suburban Wholesalers whereas the proof showed a payment of $65,000 by both Suburban and Morning Wholesalers, who contributed $20,000. It is apparent that the variance, such as there was, did not "affect the substantial rights of the accused," *Berger* v. *United States*, 295 U. S. 78, 82 (1935). The accused in the case at bar was definitely informed as to the charges against him and any doubt which might

conceivably exist is satisfied by the bill of particulars which clearly sets forth that the evidence would show a demand for $65,000 from both Suburban and Morning Wholesalers of which $45,000 was paid by Suburban. See *United States* v. *Miller*, 246 F. 2d 486, 489 (2 Cir. 1957); *United States* v. *Sing Kee*, 250 F. 2d 236, 242 (2 Cir. 1957).

II.

Appellant alleges denial of a fair trial and reversible error in the denial of his motion for a mistrial on the ground that ten of the jurors had read a newspaper article concerning the trial of the action which singled out the name of the appellant identifying him as the former president of the Newspaper and Mail Deliverers Union and as one of the individuals remaining on trial, and named Irving Bitz and Harry Waltzer as co-defendants who had entered a plea of guilty. The trial judge upon learning that ten of the jurors had read the newspaper article, questioned the jurors as to whether the newspaper article would influence their judgment and whether they would follow the court's instructions. The court received assurances that the jurors would consider the case as developed in court and submitted to them by the judge.

In *Marshall* v. *United States*, 360 U. S. 310 (1959), the Supreme Court reversed a conviction of unlawfully dispensing drugs because of newspaper articles, disclosing defendant's prior criminal record and prior admissions of the defendant to having dispensed drugs without a license in the past, which were read by some of the jurors. In *Marshall*, as here, the trial judge gave precautionary instructions to the jury. The crux of the matter is whether

the statements were so prejudicial as to require the trial judge, who has large discretion in such matters, *Holt* v. *United States*, 218 U. S. 245, 251 (1910), to empanel a new jury.

As the Supreme Court stated in *Marshall* the action to be taken with respect to jurors reading an article containing inadmissible evidence in "each case must turn on its special facts," *United States* v. *Marshall*, *supra*, at 312.

In the case at bar the newspaper article did not contain any detrimental statements concerning Feldman, but referred only to the guilty pleas of defendants Bitz and Waltzer. It was entirely consistent with his defense and the evidence presented for a jury to conclude that although extortion may have been committed by Bitz, appellant was not connected to the crime.[1] We do not think that the principle of *Marshall* extends to the instant case. See *United States* v. *Crosby*, 294 F. 2d 928, 948-950 (2 Cir. 1961).

III.

The denial of a severance and the motion for a new trial after the jury returned a verdict of guilty was within the court's discretion in view of the Sherman Act counts against all of the defendants, which were held to be sufficient, *United States* v. *Bitz*, 179 F. Supp. 80 (S. D. N. Y.

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[1] Excerpt from summation of counsel for appellant, Tr. p. 2209.

> "Now, I have no doubt, ladies and gentlemen of the jury, that Irving Bitz took these people; I have no doubt that he sold them the idea that he can get the officials of the union to go along. But I deny, and the evidence doesn't warrant it, that any of the officials—and I am talking about Feldman now—knew anything about it or consented to it."

1959) (motion to dismiss granted as to count one of the indictment and denied as to count two), reversed in part 282 F. 2d 465 (2 Cir. 1960) (count one held sufficient). The jury was instructed not to consider against Feldman the evidence concerning the 1955 extortion charged in Counts Three and Four against others. Since we must assume that the jury will follow proper cautionary instructions as to the personal nature of guilt, when such instructions are given, the common counts are pressed in good faith, and no exceptional circumstances indicating prejudice exist, the joinder is proper and the motion for a severance was properly denied: *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); *United States* v. *Schaffer*, 266 F. 2d 435 (2 Cir. 1959), aff'd 362 U. S. 511 (1960).

IV.

The conclusion of the jury governs as to the credibility of witnesses. They and not we are the final judges as to veracity. Thus viewed, the evidence, specifically Gaynor's testimony of Feldman's demands and the payments made to his designee Bitz was sufficient for conviction.

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

I dissent.

In *Marshall* v. *United States*, 360 U. S. 310, the Court reversed a judgment of conviction and ordered a new trial because some of the jurors had read newspaper articles in which it was stated that defendant, who was being tried for unlawfully dispensing certain drugs, had previously practiced medicine without a license. The Court said:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States*, 335 U. S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures."

In the present case, ten of the jurors were informed by reading a newspaper article that Irving Bitz, one of the appellant's codefendants had pleaded guilty. This information could not have been offered in evidence, and was, I believe, even more prejudicial to the defense than was the information to which the jury was exposed in the *Marshall* case.

I find nothing in the record of the present case to support the view of the majority opinion that Bitz's plea of guilty was consistent with appellant's defense.[1] On the contrary appellant's defense was confined to a simple, flat denial of the testimony of the government's witnesses who testified that Bitz collected the extortion money for Feldman and his fellow union officers. It is almost inevitable that, upon being told that Bitz had pleaded guilty, the jurors would assume that Feldman was also guilty.

The judgment of conviction should be reversed and a new trial granted.

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[1] The attempt by counsel for appellant to argue in his summation that Bitz was guilty but Feldman not guilty was addressed to a jury which knew from the newspapers that Bitz had pleaded guilty. Counsel was obviously forced by the circumstances to make that argument, however weak it may have been in the light of the evidence.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and rules involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Davenport v. *United States*, 260 F. 2d 591, certiorari denied, 359 U.S. 909	9
Delli Paoli v. *United States*, 352 U.S. 232	8
Holt v. *United States*, 218 U.S. 245	7
Marshall v. *United States*, 360 U.S. 310	7, 8
Michelson v. *United States*, 335 U.S. 469	8
Opper v. *United States*, 348 U.S. 84	8
Payton v. *United States*, 222 F. 2d 794	8
Richards v. *United States*, 193 F. 2d 554, certiorari denied *sub nom. Krupnick* v. *United States*, 343 U.S. 930	9
Schaffer v. *United States*, 362 U.S. 511	10, 11
United States v. *Bitz*, 179 F. Supp. 80, reversed, 282 F. 2d 465	4
United States v. *Carlucci*, 288 F. 2d 691, certiorari denied, 366 U.S. 961	9
United States v. *Coduto*, 284 F. 2d 464, certiorari denied, 365 U.S. 881	9
United States v. *Crosby*, 294 F. 2d 928	9
United States v. *Toner*, 173 F. 2d 140	8
United States v. *Vita*, 294 F. 2d 524, certiorari denied, 369 U.S. 823	9
Wood v. *United States*, 279 F. 2d 359	9

Statutes and Rules:

	Page
Federal Rules of Criminal Procedure:	
Rule 8	2
Rule 14	2
Hobbs Act, 18 U.S.C. 1951	2
Sherman Act, as amended, 15 U.S.C. 1, *et seq.*	
Section 1	2
Section 2	2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 877

SAM FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31–39) is reported at 299 F. 2d 914.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1962. The time for filing a petition for certiorari was extended to April 16, 1962, by order of Mr. Justice Harlan dated March 15, 1962. The petition was filed on Monday, April 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion for a mistrial on the

ground that ten of the jurors had read a newspaper article disclosing the fact that two of petitioner's co-defendants had pleaded guilty, where each juror assured the court that his determination of the case would not be influenced in any way by the newspaper article.

2. Whether, where a single indictment properly joined counts charging all defendants with violations of the Sherman Act and counts charging some defendants with violating the Hobbs anti-extortion Act, the dismissal of the Sherman Act counts after trial for failure of proof invalidated the joinder of counts under the two statutes, and required a new trial under the Hobbs Act.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. 1 and 2, and of the Hobbs Act, 18 U.S.C. 1951, are set forth in the petition at pages 4–6. Rules 8 and 14 of the Federal Rules of Criminal Procedure are set forth in the petition at pages 6–7.

STATEMENT

On June 23, 1959, a six-count indictment was returned against eleven individuals and one corporation (10a–24a).[1] The defendants were the petitioner, Sam Feldman, President of the Newspaper and Mail Deliverers' Union; the treasurer and four business agents of that union; five officials of various compa-

[1] We have followed the method of citation used in the petition. Numbers followed by the letter "a" refer to pages of the appendix to petitioner's brief in the court of appeals. The transcript of the trial is cited as "Tr."

nies in the business of wholesale distribution of newspapers and magazines; and one of those companies, Bi-County News Corp.

The first count charged all defendants with violating Section 1 of the Sherman Act by conspiring to restrain interstate commerce in the distribution and sale of newspapers and magazines. It was charged that the means of effectuating the conspiracy included the threat of strikes to extort money from an association of newspaper distributors (Suburban Wholesalers) and the hindering and excluding actual or potential competitors of Bi-County News Corp. (10a–17a). The second count charged all the defendants, except two of the union's business agents, with a violation of Section 2 of the Sherman Act by conspiring to monopolize for Bi-County News Corp. interstate commerce in the wholesale distribution of newspapers and magazines in Nassau and Suffolk Counties, New York, by the same means as alleged in count one (17a–19a).

The third count charged three of the union's business agents with extorting $25,000 from Suburban Wholesalers in 1955 in violation of the Hobbs Act. The fourth count charged the same defendants with conspiring to commit the substantive offense charged in count three (20a–22a).

The fifth count charged that in 1957 the petitioner, the treasurer and two of the business agents of the union, and two news company officials extorted $45,000 from Suburban Wholesalers in violation of the Hobbs Act. The sixth count charged those defendants with conspiracy to commit the substantive offense charged in count five (22a–24a).

Prior to trial, one of the defendants, an officer and stockholder of Bi-County News, pleaded guilty to all counts pending against him. The remaining defendants moved to dismiss counts one and two of the indictment on the ground that they failed to state a violation of the Sherman Act. The motion was granted as to count one and denied as to count two (*United States* v. *Bitz*, 179 F. Supp. 80 (S.D.N.Y.)). On appeal, the court of appeals reversed and held that count one was sufficient to charge a violation of Section 1 of the Sherman Act (*United States* v. *Bitz*, 282 F. 2d 465 (C.A. 2)). Defendants, including petitioner, also filed pre-trial motions for severance which were denied (25a–37a).

At the opening of trial, one of the business agents of the union pleaded guilty to counts one, three and four and his case was severed for trial of the remaining counts (Tr. 31, 36). On motions of the defendants, the trial judge, while stating that there was no prejudice, empaneled a new jury (Tr. 39–42).

On the second day of the ensuing trial, petitioner brought to the court's attention a newspaper article which disclosed the fact that two of petitioner's co-defendants had pleaded guilty. (Tr. 138–141).[2] At

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[2] The article which appeared at page 5 of the *New York Daily News* of April 5, 1961, read (Tr. 140):

Jury Is Picked in Extort Trial

A jury of nine men and three women was chosen yesterday before Federal Judge Edward Weinfeld to try eight men and a magazine distributing firm on charges of extortion and violating the antitrust laws in wholesale distribution of newspapers and magazines in the metropolitan area.

petitioner's request, the jury was polled by the judge and ten jurors admitted having read the article (Tr. 141, 153–154). The trial court questioned each juror individually and was assured that the article would not influence his determination of the case, and that he would decide the case solely on the evidence received in the courtroom (Tr. 155–155a). At that time the court made the following statement (Tr. 153–154):

> Members of the jury, my attention has been directed to a newspaper article referring to this case. I think I told you last night, almost the last words I uttered before we adjourned for the day, to please bear in mind my original instruction to you in this case at the time of your selection as jurors, that, while there are only seven defendants on trial out of a total of eleven, the guilt or innocence of the defendants on trial must be decided and resolved solely and only with respect to evidence that may be submitted as against them or the lack of evidence, and even with respect to co-defendants on trial, the case of each defendant ultimately, should it be submitted to you, must be treated as if he were the sole defendant on trial, and the case resolved with respect to him on the basis only of testimony submitted as against him * * *.

Defendants included former officials of the Newspaper and Mail Deliverers Union.

Among them was Sam Feldman, 42, of 41 Dorchester Ave., Bronx, union president from May, 1956, until May, 1959.

Of the 11 defendants named originally, two pleaded guilty. On his plea, Irving Bitz of Kings Point, L.I., was sentenced to five years in prison. On Monday, Harry Waltzer, former business agent, pleaded guilty. Sentence still is to be imposed.

Petitioner then made a motion for a mistrial, which was denied (Tr. 155a–156).

At the conclusion of the government's case the court granted defense motions for dismissal of count two as to all defendants (Tr. 1863–1864), but reserved decision on motions for dismissal of count one (Tr. 1893). The court also directed verdicts of acquittal for two of the newspaper company officials and the corporate defendant on count one and two (Tr. 1866), and for the treasurer and one of the business agents of the union on counts one, two, five and six (Tr. 1840–1841, 1851). At the close of the entire case the court dismissed count one as to all remaining defendants (Tr. 2098–2099).

The evidence was submitted to the jury as to the remaining three defendants[3]—the petitioner and two of the business agents of the union (Tr. 2099). The court gave the following instruction as part of the charge to the jury (Tr. 2301–2302):

> The fact that one or more persons originally named in the indictment have pleaded guilty, that others have been acquitted by direction of the Court, or that the indictment has been severed as to still others, may not, in any respect, be considered by you for or against the defendants who remain on trial.
>
> This must play no part in your deliberations.
>
> As I have instructed you on a number of occasions, guilt is personal. Accordingly, the guilt or innocence of each defendant must be determined separately with respect to him,

[3] One of the defendants was granted a severance because of poor health and *a nolle prosequi* was entered on the charges against another.

> solely and only upon the evidence, or the lack of evidence, pertaining to him.
>
> Thus, the case of each defendant must be considered under the count wherein he is named, as if he were separately on trial.

The jury returned verdicts of guilty as to the three defendants on all counts submitted (Tr. 2363).

Petitioner made a timely motion for a new trial on the ground that he had been prejudiced by the denial of a severance (Tr. 2369–2372). This motion was denied by the court (Tr. 2377). Thereupon, the court sentenced petitioner to imprisonment for a year and a day on counts five and six, the sentences to run concurrently (Tr. 2413). On appeal, this judgment was affirmed by the Court of Appeals for the Second Circuit (Pet. App. 31–38), one judge dissenting (Pet. App. 38–39).

ARGUMENT

1. Petitioner argues that the district court committed reversible error in denying a mistrial after it had learned that members of the jury had read a newspaper article disclosing that two of petitioner's co-defendants had pleaded guilty (Pet. 14–18). It is settled, however, that the trial judge has a large discretion in determining whether a news article to which the jury was exposed was so prejudicial as to require the empaneling of a new jury. (*Marshall* v. *United States*, 360 U.S. 310, 312; *Holt* v. *United States*, 218 U.S. 245, 251). There is no showing that the court abused that discretion here.

The trial judge asked each juror individually whether the article would influence his decision, and upon receiving assurance that it would not, the court

carefully instructed the jury that the guilt or innocence of each defendant must be decided separately on the evidence heard in the courtroom. The court gave a similar instruction as part of its final charge, adding that the fact that other persons named in the indictment have pleaded guilty or been acquitted by the Court "may not, in any respect, be considered by you for or against the defendants who remain on trial" (see Statement, *supra*, p. 6).

Petitioner contends that such instructions could not remove the "prejudicial" effect of the newspaper article on the jury (Pet. 16), but this Court has repeatedly recognized that "[o]ur theory of trial relies upon the ability of a jury to follow instructions." (*Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242). Although it was held in *Marshall* that the prejudicial effect of the newspaper articles read by the jury in that case could not be overcome by precautionary instructions from the bench, the Court stressed that it was not possible to generalize as to the situations which would require a new trial since "each case must turn on its special facts." (*Marshall* v. *United States*, 360 U.S. at 312).[4] *Marshall* involved disclosure to the jury of a prior conviction of the defendant—a type of evidence which has historically been held inadmissible precisely because of its prejudicial effect on the jury. (*Michelson* v. *United States*, 335 U.S. 469, 475–76). Here, the

[4] It has been held reversible error to emphasize a guilty plea of a co-defendant in the charge to the jury (*e.g.*, *Payton* v. *United States*, 222 F. 2d 794 (C.A.D.C.); *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3)). Petitioner makes—and could make—no such claim here, however.

disclosure was not of prior acts of the petitioner but of a guilty plea by two co-defendants. In absence of special circumstances showing prejudice, such a disclosure has been uniformly held not to be grounds for granting a new trial.[5] (*United States* v. *Crosby*, 294 F. 2d 928, 948–50 (C.A. 2); *Wood* v. *United States*, 279 F. 2d 359, 363 (C.A. 8); *Davenport* v. *United States*, 260 F. 2d 591, 596 (C.A. 9), certiorari denied, 359 U.S. 909; *Richards* v. *United States*, 193 F. 2d 554, 556 (C.A. 10), certiorari denied, *sub nom. Krupnick* v. *United States*, 343 U.S. 930.) There were no special circumstances showing prejudice here. Moreover, the acquittal of five defendants at the conclusion of the government's case emphasized that the jury could not infer the guilt of all from the fact that two had pleaded guilty.

2. Petitioner also argues that since the Sherman Act counts of the indictment, which were the basis

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[5] Since *Marshall*, courts of appeals have upheld the denial of mistrials where jurors had seen newspaper accounts of the trial in which they were sitting. *E.g. United States* v. *Carlucci*, 288 F. 2d 691, 694 (C.A. 3), certiorari denied, 366 U.S. 961; *United States* v. *Vita*, 294 F. 2d 524, 527 (C.A. 2), certiorari denied on other issues, 369 U.S. 823; cf. *United States* v. *Crosby*, *supra*, at 948–950. See also *United States* v. *Coduto*, 284 F. 2d 464, 467 (C.A. 7), certiorari denied, 365 U.S. 881, rehearing denied, 366 U.S. 947.

[6] The third question raised by petitioner regarding an alleged variance between the indictment and the proof at trial (Pet. 26–29) is without merit. As the court of appeals pointed out "[i]t is apparent that the variance, such as there was, did not 'affect the substantial rights of the accused.' *Berger* v. *United States*, 295 U.S. 78, 82 (1935). The accused in the case at bar was definitely informed as to the charges against him and any doubt which might conceivably exist is satisfied by the bill of particulars which clearly sets forth that the evidence

for joinder of the defendants under Rule 8(b) of the Federal Rules of Criminal Procedure, were dismissed for lack of evidence, "the anti-trust counts of the indictment should be considered void ab initio with respect to consideration of the rights of the Petitioner for a severance" (Pet. 23). The contention is disposed of by *Schaffer* v. *United States*, 362 U.S. 511. The Court held there that dismissal of the common count which was the basis for joinder under Rule 8(b) did not automatically invalidate the joinder, and that "subsequent severance was controlled by Rule 14, which provides for separate trials where 'it appears that a defendant * * * is prejudiced * * * by such joinder for trial * * * .'" (362 U.S. at 515–16). In the present case, the district court rejected petitioner's claim of prejudice (Tr. 2370, 2377), and the court of appeals expressly found that "no exceptional circumstances indicating prejudice exist * * *" (Pet. App. 58). Petitioner has failed to show any basis in the record for reversing these determinations.[7]

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would show a demand for $65,000 from both Suburban and Morning Wholesalers of which $45,000 was paid by Suburban" (Pet. App. 35–36).

[7] There is no merit to petitioner's attempt to distinguish *Schaffer* on the ground that there the validity of the "common count linking all of the said defendants" was not challenged, while here the common Sherman Act counts were challenged on the ground that they were based "upon the Government's erroneous theory that the evidence concerning the separate 1955, and 1957 Hobbs Act violations, also constituted *per se* violations of the Anti-Trust Laws" (Pet. 23). Petitioner is correct as far as he goes: a challenge was made but was squarely rejected by the court, which held that there could be cases where a violation of the Hobbs Act would also be a violation of the Sherman Act. It dismissed the Sherman Act count

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectively submitted.

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MAY 1962.

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because "the evidence fails to support a charge of unreasonable restraint upon commerce • • •" (Tr. 2026). Since petitioner admits that the antitrust counts were not brought in bad faith by the government (Pet. 24), the only "erroneous theory" on the part of the government was failure to prove the allegations of the Sherman Act counts, which was precisely the situation in *Schaffer*.